DEC 3 - 2010

No. 10-309

In the Supreme Court of the United States

MONICA CASTRO, INDIVIDUALLY AND AS NEXT FRIEND OF R. M. G., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

When Omar Gallardo, a Mexican national, was detained and returned to Mexico by the United States Border Patrol, federal officers allowed his infant daughter to remain in his care. The child's mother, Monica Castro, brought suit on behalf of herself and her daughter under the Federal Tort Claims Act, 28 U.S.C. 1346(b)(1), 2671-2680, claiming that the Border Patrol officers' refusal to forcibly remove the infant from her father violated state tort law.

The question presented is whether petitioner's claim against the United States is barred by 28 U.S.C. 2680(a), which provides that the federal government's tort liability does not extend to claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-18a) is reported at 608 F.3d 266. The panel opinion of the court of appeals (Pet. App. 19a-51a) is reported at 560 F.3d 381. The opinion and order of the district court (Pet. App. 52a-79a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 2010. The petition for a writ of certiorari was filed on August 30, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Enacted in 1946, the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, creates a cause of

action against the United States for negligent or wrongful acts of federal employees within the scope of their employment "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). The statute does not subject the United States to suit for constitutional claims or violations of federal law. *FDIC* v. *Meyer*, 510 U.S. 471, 477-478 (1994).

Liability under the FTCA is limited by several exceptions, including an exception for any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). This discretionary function exception, which has been part of the FTCA since its enactment, serves "to prevent judicial second-guessing of legislative and administrative decisions * * * through the medium of an action in tort." *United States* v. *Gaubert*, 499 U.S. 315, 323 (1991) (internal quotation marks omitted).

The FTCA also excludes most intentional torts—"[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights"—from its waiver of sovereign immunity. 28 U.S.C. 2680(h). In 1974, Congress qualified that exception, providing that the FTCA does apply to claims for "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" based on "acts or omissions of investigative or law enforcement officers of the United States Government." *Ibid.*

2. Petitioner, a United States citizen, and Omar Gallardo, a Mexican national, lived together in the Lubbock, Texas area, where petitioner gave birth to their daughter, R.M.G. Pet. App. 53a-54a. On November 29, 2003, shortly before R.M.G.'s first birthday, petitioner left Gallardo and their daughter following an argument. *Ibid.* Petitioner contacted Texas Child Protective Services (part of the Texas Department of Family and Protective Services), the county sheriff's department, and the local police department later that day to determine how to obtain custody of the child. *Id.* at 54a-55a.

All three agencies informed petitioner that she and Gallardo shared parental rights and that she would need to hire an attorney to seek a custody order. Pet. App. 55a, 68a. Child Protective Services suggested that petitioner fill out an application to obtain assistance in securing custody. *Id.* at 55a. Petitioner did not do so, stating that she did not wish to wait one to two days for the process to be completed. *Id.* at 55a-56a.

Instead, two days later, petitioner went to the local United States Border Patrol station to report Gallardo as an illegal alien. Pet. App. 56a. When petitioner asked a Border Patrol agent whether she could recover R.M.G. from Gallardo, the agent "informed [petitioner] that she needed to get a court order for temporary custody of R.M.G." *Ibid.*[1] The agent also suggested that if petitioner were present when Gallardo was apprehended, she could take custody of the child after the agents ques-

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[1] Specifically, the Border Patrol agent contacted the sheriff's department and was informed that "the best thing for [petitioner] to do was obtain a court order from a Judge ordering her husband to release the child to her." Record on Appeal 241-242, 862, 952 (ROA). Based on this conversation, the agent advised petitioner to obtain a court order for temporary custody of the child "as soon as possible." ROA 243, 952.

tioned everyone on site about their immigration status. *Id.* at 56a-57a. Petitioner did not seek a state custody order at that time, and declined to be present when the agents visited Gallardo. *Id.* at 57a, 68a-69a.

Acting on the information provided by petitioner, the Border Patrol apprehended Gallardo two days later, at approximately 7:00 in the morning. Pet. App. 57a; ROA 865. Gallardo had R.M.G. with him when he was taken into custody, and took her with him to the Border Patrol station. Pet. App. 57a. Petitioner observed the proceedings from a relative's home across the street, but did not make her presence known to the Border Patrol agents. *Ibid.*

Petitioner arrived at the Border Patrol station soon after, and requested that R.M.G. be taken from Gallardo and given to her. Pet. App. 57a. The Border Patrol informed Gallardo that petitioner had come to the station and had asked for their daughter; Gallardo responded that petitioner had abandoned him and their baby and that he did not want to give R.M.G. to petitioner. *Id.* at 57a-58a.

The Border Patrol agents contacted the Texas Department of Family and Protective Services to determine whether the state agency could resolve the custody dispute. Pet. App. 58a; ROA 249. State officials instructed the Border Patrol that "the father had the right to the child," and that, absent allegations of harm to the infant, the Department was "not in a position to take the child away from the parent that had physical custody" and would not become involved in the dispute. Pet. App. 58a; ROA 245-246, 249, 949, 953.

Gallardo admitted that he was in the United States illegally, and the Border Patrol prepared to return him to Mexico on the agency's daily transport, which was

scheduled to leave no later than 3:15 p.m. to ensure that it would arrive in Mexico at a reasonable hour. Pet. App 58a; ROA 249.

At approximately 1:30 p.m., petitioner retained an attorney to seek a temporary custody order for R.M.G. Pet. App. 58a. The attorney drafted the necessary paperwork and proceeded to the courthouse, but was unable to obtain a signed order before the transport departed. *Id.* at 58a-59a. Although the transport takes approximately seven hours to travel to Mexico, ROA 916, petitioner's attorney did not pursue the matter further after the transport departed. Pet. App. 59a; ROA 934. Gallardo was thus repatriated to Mexico accompanied by his daughter. Pet. App. 59a.

3. Petitioner brought suit against the United States on behalf of herself and R.M.G., seeking relief under the Fourth and Fifth Amendments, the FTCA, and the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* Pet. App. 80a. Petitioner alleged that the Border Patrol had acted tortiously by allowing Gallardo to retain custody of his infant daughter while he was processed for removal and subsequently returned to Mexico. Petitioner asserted claims of negligence, intentional infliction of emotional distress, false imprisonment, abuse of process, and assault, *id.* at 89a-95a, and sought damages of $2.5 million apiece for herself and R.M.G., *id.* at 95a.

The district court dismissed the suit, holding, *inter alia*, that petitioner's FTCA claims were barred by the discretionary function exception, 28 U.S.C. 2680(a). Pet. App. 52a-79a. The court explained that the exception applies to discretionary conduct that is "the product of 'judgment or choice'" and "susceptible to policy analysis." *Id.* at 67a, 74a (citations omitted), and held that the

Border Patrol's actions met both of those criteria. The court noted that petitioner had been informed repeatedly by state and local agencies that she would need to obtain a court order before she would be entitled to take her daughter from Gallardo, and that petitioner had declined to do so. *Id.* at 68a. Instead, petitioner had waited two days before contacting the Border Patrol to report that Gallardo was an illegal alien. *Ibid.* When Gallardo was taken to the Border Patrol station two days later, "very early in the morning," petitioner had waited six hours before seeking a court order and then abandoned her efforts once Gallardo and R.M.G. were placed on the transport to Mexico. *Id.* at 69a-70a.

The district court explained that petitioner's "decision not to be present at the time of the arrest" and "not to seek a custody order of her daughter prior to an hour and a half before Mr. Gallardo was scheduled to be repatriated to Mexico" presented the Border Patrol with "an untenable decision: either forcibly remove R.M.G. from Mr. Gallardo even though there was no custody order directing them to do so, or let Mr. Gallardo continue with his possession of R.M.G., even though Mr. Gallardo was being repatriated to Mexico." Pet. App. 70a, 73a. The court found "no statute, regulation or policy that directed the Border Patrol Agents to take a certain course of action in this unique situation," and held that the officers' actions were the product of judgment or choice. *Id.* at 71a. The court further held that the federal officers' decisions, involving the treatment of an infant child in possession of a foreign national under the Border Patrol's authority, were "unequivocally subject to policy analysis." *Id.* at 75a.

The court accordingly dismissed petitioner's FTCA claims for lack of jurisdiction. Pet. App. 76a.[2] The court dismissed the remainder of petitioner's claims as nonjusticiable, and entered judgment for the United States. *Id.* at 76a-79a.

4. A divided panel of the Fifth Circuit reversed. Pet. App. 19a-51a. The panel did not question that the conduct at issue was of the kind protected by the discretionary function exception. The majority noted, however, that the discretionary function exception does not apply when "a statute, regulation, or policy mandates a specific course of action." *Id.* at 28a (quoting *Garza* v. *United States*, 161 Fed. Appx. 341, 343 (5th Cir. 2005)). The majority reasoned that discretion would likewise be precluded in the face of alleged constitutional violations and that, in this case, petitioner's allegations were sufficiently "intertwined with * * * constitutional strands" to withstand dismissal. *Id.* at 35a, 38a. The panel accordingly remanded "for the district court to consider in the first instance to what extent the alleged constitutional violations are cognizable under [petitioner's] FTCA claims." *Id.* at 39a.

Judge Smith dissented. Pet. App. 40a-51a. The dissent noted that the FTCA does not waive the United States' sovereign immunity for alleged constitutional torts, which may be redressed by money damages only through suits against individual officers under *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Pet. App. 42a-44a. The dissent

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[2] Petitioner did not contend in the district court that either her allegations of constitutional misconduct or 28 U.S.C. 2680(h)'s law enforcement proviso bore any relevance to whether the Border Patrol officers' actions were beyond the reach of the discretionary function exception, and the district court did not address those points.

argued that, in finding petitioner's generalized constitutional claims sufficient to overcome the discretionary function exception, the majority had "turn[ed] *Bivens* on its head" by providing that "the United States may be liable for conduct even where its officers cannot be," in instances where the conduct alleged was not clearly contrary to the Constitution. *Id.* at 44a. Judge Smith emphasized that the Border Patrol had not violated any constitutional provision, clear or otherwise: the agency had allowed the infant's parent to make decisions affecting her welfare, and in so doing had chosen the course "that least enmeshed the federal government in state custody issues" by "elect[ing] not to interfere with the *status quo* as R.M.G.'s parents had left it." *Id.* at 48a-49a; see *id.* at 47a.

5. The Fifth Circuit granted rehearing en banc on the United States' petition, vacated the panel's decision, and ultimately affirmed the district court's judgment. Pet. App. 2a-3a. Affirming "essentially for the reasons stated by the district court," the en banc court determined that under this Court's decision in *Gaubert*, petitioner's allegations fell within the discretionary function exception. *Ibid.* Specifically, the court held that the Border Patrol officers' elected course of action was "the product of a judgment or choice," "not mandated by any statute, regulation or policy," and "unequivocally subject to policy analysis, as it involved the use of government resources and necessarily involved a decision as to what the Border Patrol should do with a United States citizen child in the unique circumstances presented by such a case." *Id.* at 3a (quoting *id.* at 75a).

Judges DeMoss and Stewart dissented, concluding that the law enforcement proviso in 28 U.S.C. 2860(h) and petitioner's constitutional allegations precluded ap-

plication of the discretionary function exception, and that the Border Patrol's actions extended beyond the scope of authority granted by the INA. Pet. App. 4a-14a. Judge Dennis concurred in part and dissented in part, agreeing with Judges DeMoss and Stewart's conclusions that the law enforcement proviso prevented application of the discretionary function exception to petitioner's intentional tort claims, but noting that petitioner's false imprisonment allegations "clearly failed to state a claim on which relief can be granted" under applicable state law and that the same might be true of petitioner's remaining intentional tort claims. *Id.* at 16a-17a. With respect to petitioner's claims not covered by the law enforcement proviso, Judge Dennis concluded that no such violations had been alleged by petitioner and that reversal of the district court's judgment with respect to those claims was accordingly unwarranted. *Id.* at 17a-18a.

ARGUMENT

Petitioner contends (Pet. i, 15, 28) that certiorari is warranted to resolve a conflict among the circuits as to whether the discretionary function exception, 28 U.S.C. 2680(a), may apply in circumstances in which a plaintiff has generally alleged constitutional violations or intentional torts that fall within the law enforcement proviso of 28 U.S.C. 2680(h). Petitioner, however, did not properly raise either of those contentions below, and the en banc court of appeals did not address them. The court of appeals' decision is correct in any event. Further review is not warranted.

1. The Fifth Circuit's en banc decision addresses neither of the questions presented in the petition for a

writ of certiorari, and neither was properly preserved below.

a. Petitioner contends that the decision below "extends the [discretionary function] exception to conduct that exceeds an employee's statutory authority or violates the Constitution." Pet. 15. The court of appeals' five-paragraph per curiam opinion includes no discussion of that question. See Pet. App. 1a-3a. Instead, the court of appeals affirmed "essentially for the reasons given by the district court," *id.* at 3a, and the district court did not decide the question posited by petitioner either.

In the district court, petitioner did not argue that allegations of constitutional violations were sufficient to render the discretionary function exception inapplicable. See Pet. First Amended Resp. to Defendant's Rule 12(b)(1) Mot. to Dismiss for Lack of Subject Matter Jurisdiction & Mot. for Summ. Judgment 1-25 (Pet. Amended MTD Resp.). Instead, petitioner's "main argument [was] that in letting R.M.G. go with her father to Mexico, the Border Patrol Agents made an 'impermissible custody determination' in favor of Mr. Gallardo." Pet. App. 72a. She contended that this determination was *ultra vires* because the Border Patrol had no statutory "authority to decide that Gallardo's possession of R.M.G. bestowed on him greater parental rights." Pet. Amended MTD Resp. 17.

The district court did not reject this claim on the ground that the discretionary function exception covered "*ultra vires* conduct * * * that exceeds the scope of an employee's statutory * * * authority," Pet. 15, but instead on the ground that there was no such conduct in this case. Pet. App. 72a ("The Border Patrol did not actually make any 'custody determination' on De-

cember 3, 2003. The Border Patrol issued no custody order and made no determination that R.M.G. should remain permanently with either her mother or her father.").[3]

Subsequently, petitioner argued for the first time before the court of appeals that "because the challenged acts were unconstitutional, the discretionary function exception is inapplicable." Pet. C.A. Panel Br. 35 (capitalization altered). Notwithstanding petitioner's failure to make this argument before the district court, the court of appeals panel reached out to decide it. Pet. App. 35a, 38a. The en banc court chose not to do so, however, reviewing only matters actually decided by the district court and resolving them "essentially for the reasons given by the district court." *Id.* at 3a; see Gov't Supp. Br. 22 n.6 (pointing out to en banc court that petitioner "did not argue" in the district court "that any constitutional violation—clear or otherwise—could overcome the discretionary function exception").

It is thus not at all "astonishing[]" (Pet. 20 n.7) that a later panel of the court of appeals, citing the en banc decision in this case, said that "[t]his court has not yet determined whether a constitutional violation, as opposed to a statutory, regulatory, or policy violation, precludes the application of the discretionary function exception." *Spotts* v. *United States*, 613 F.3d 559, 569 (5th

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[3] Similarly, petitioner contended in the district court that "federal law does not authorize federal immigration officials to detain or deport U.S. citizens," rendering the discretionary function exception inapplicable. Pet. Amended MTD Resp. 9 (capitalization altered). The district court rejected that contention on the ground that there was no detention or deportation of R.M.G. Pet. App. 71a-72a n.12.; see *id.* at 47a (Smith, J., dissenting) (R.M.G. "was not arrested, detained, held in custody, or deported—she was with *her father* and with *his consent*.").

Cir. 2010) (citing *Castro* v. *United States*, 608 F.3d 266 (5th Cir. 2010)). Indeed, in *Spotts*, just as here, the court of appeals found it unnecessary to decide that question because "[b]y failing to plead or otherwise argue to the district court that the alleged [constitutional] violation precluded the application of the discretionary function exception, the plaintiffs * * * waived this contention on appeal." *Ibid.*

b. In petitioner's second question presented, she contends that the decision below should be reviewed because it "align[s]" the Fifth Circuit "with the strongest version of the D.C. Circuit's position" on the meaning of the law enforcement proviso in 28 U.S.C. 2680(h). Pet. 33. There is, however, no mention of this question in the en banc court of appeals' decision. See Pet. App. 1a-3a. Nor did the district court—whose reasoning the en banc court adopted, *id.* at 3a—address the contention petitioner now makes that conduct that falls within the law enforcement proviso is categorically excluded from the discretionary function exception.

The absence of a decision on this question by the district court is not surprising because petitioner did not make an argument based on Section 2680(h) there. See Pet. Amended MTD Resp. 1-25. Indeed, petitioner did not make this argument before the court of appeals panel either. See Pet. C.A. Br. 11-49; see also *id.* at ix (no citations to 28 U.S.C. 2680(h) in Table of Authorities); Pet. App. 42a n.2 (Smith, J., dissenting) ("[Petitioner] does not allege that [Section] 2680(h) has any bearing on this case."). Petitioner advanced this contention for the first time before the en banc court. See Pet. Supp. C.A. Br. 7, 25. At that point, it was too late. See *United States* v. *Brace*, 145 F.3d 247, 261 (5th Cir.) (en banc) (en banc Fifth Circuit will not address claims "not

presented on appeal to the panel"), cert. denied, 525 U.S. 973 (1998).

c. Given that petitioner's questions presented were neither passed on below nor properly pressed, they provide no basis for this Court's review. See *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)).

2. Even assuming *arguendo* that the court of appeals had implicitly resolved these questions without discussing them, its decision would be correct.

a. The discretionary function exception limits the FTCA's waiver of sovereign immunity, barring claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). The exception prevents a plaintiff from testing "the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act * * * through the medium of a damage suit for tort." *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense* (*Varig Airlines*), 467 U.S. 797, 809-810 (1984) (citation omitted). The exception applies whenever a federal officer's action involves "an element of judgment or choice" and is "susceptible to policy analysis." *United States* v. *Gaubert*, 499 U.S. 315, 322, 325 (1991) (quoting *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988)).

There is no dispute among the circuits—or among the parties to this case—that when a federal officer acts contrary to a specific prescription in federal law, be it

constitutional, statutory, or regulatory, the discretionary function does not apply. This Court has explained that when a "federal statute, regulation, or policy *specifically prescribes* a course of action for an employee to follow," the government has already exercised relevant policy discretion and there is no further discretion to exercise. *Gaubert*, 499 U.S. at 322 (quoting *Berkovitz*, 486 U.S. at 536) (emphasis added).

Petitioner misconstrues this analysis, however, in contending that conduct cannot fall within the discretionary function exception whenever it is alleged to be unconstitutional or otherwise contrary to law. Pet. 21-22. That contention is at odds with the repeated statements of this Court that the discretionary function exception applies unless a source of federal law "*specifically* prescribes" a course of conduct, and with the principles of official immunity that formed the backdrop to the FTCA and that were incorporated by Congress into the statute. The Court has long recognized that conduct may be discretionary even if it is later determined to have violated the Constitution. The common law doctrine of official immunity thus applies to the exercise of "discretionary functions" even when conduct violated the Constitution, as long as the constitutional right was not defined with sufficient specificity that the official should have known the act was prohibited. See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing *discretionary functions* * * * generally are shielded from liability for civil damages insofar as their conduct does not violate *clearly established statutory or constitutional rights* of which a reasonable person would have known.") (emphasis added).

The FTCA provided plaintiffs with a claim against the United States in place of claims against federal em-

ployees personally.[4] In enacting the FTCA, Congress did not set aside recognized principles of official immunity. See Comment, *The Federal Tort Claims Act*, 56 Yale L.J. 534, 545 (1947) ("The immunity thus retained is in accord with the generally accepted doctrine of the non-liability of public officers for acts involving the exercise of judgment and discretion."). Any doubt that might otherwise have existed on that score was removed by the inclusion of an explicit discretionary function exception. See *Varig Airlines*, 467 U.S. at 810 ("It was believed that claims of the kind embraced by the discretionary function exception would have been exempted from the waiver of sovereign immunity by judicial construction; nevertheless, the specific exception was added to make clear that the Act was not to be extended into the realm of the validity of legislation or discretionary administrative action."); see also *Coates* v. *United States*, 181 F.2d 816, 818 (8th Cir. 1950) ("Congress very deliberately used the words 'discretionary function or duty' in the [e]xceptions to the Act with the intent that they should convey the same meaning traditionally accorded by the courts."); *Gray* v. *Bell*, 712 F.2d 490, 509 (D.C. Cir. 1983) ("[T]he discretionary function exception merely reflects a congressional belief that courts would continue to apply preexisting common law doctrine barring claims against discretionary governmental acts."), cert. denied, 465 U.S. 1100 (1984). Thus, when this Court in *Berkovitz* held that a federal mandate must

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[4] When the FTCA was originally enacted, plaintiffs could elect whether to pursue an FTCA suit against the United States or an action against an individual federal officer. In enacting the Westfall Act, Congress mandated the substitution of the United States as defendant for federal employees in claims arising out of acts in the scope of their employment. 28 U.S.C. 2679(d).

"specifically prescribe" conduct in order to overcome the discretionary function exception, it drew upon official immunity precedent, see 486 U.S. at 536 (citing *Westfall* v. *Erwin*, 484 U.S. 292, 296-297 (1988)), underscoring that the two standards are to be read in tandem.

The limit on discretionary functions described in *Berkovitz* and later cases is thus not triggered by every allegation of unlawful conduct, as petitioner contends, but only by a showing that discretion was cabined by a specific, mandatory directive—a point on which the courts of appeals are unanimous. See, *e.g.*, *Freeman* v. *United States*, 556 F.3d 326, 339 (5th Cir.) ("Statements made at this level of generality do not satisfy *Gaubert*'s and *Berkovitz*'s specific prescription requirement." (citing cases)), cert. denied, 130 S. Ct. 154 (2009); *Elder* v. *United States*, 312 F.3d 1172, 1177 (10th Cir. 2002) ("The issue before us is whether the guidelines are sufficiently specific to remove decisionmaking under them from the discretionary function exception."); *Sutton* v. *Earles*, 26 F.3d 903, 909 (9th Cir. 1994) (same) (quoting *Berkovitz*, 486 U.S. at 544); *C.R.S. by D.B.S.* v. *United States*, 11 F.3d 791, 799 (8th Cir. 1993) (same) (citing *Berkovitz*, 486 U.S. at 536, 544); *Fazi* v. *United States*, 935 F.2d 535, 538 (2d Cir. 1991) (same); *Dube* v. *Pittsburgh Corning*, 870 F.2d 790, 794 (1st Cir. 1989) (same).

This requirement of specificity applies to constitutional, statutory, and regulatory limits alike. The exception's purpose, "to prevent judicial second-guessing of legislative and administrative decisions * * * through the medium of an action in tort," *Gaubert*, 499 U.S. at 323 (quotation marks omitted), is implicated in equal measure whether the mandatory duty alleged to remove an officer's conduct from the ambit of the discretionary function exception is based on a statute, regulation, or

constitutional provision. Indeed, petitioner acknowledges (Pet. 21) that the exception must be read to treat constitutional prescriptions in like fashion to statutory and regulatory ones.

A constitutional mandate, no less than a federal statutory or regulatory one, can eliminate an official's discretion when it is sufficiently specific or when an authoritative construction with sufficient specificity was clearly established before the officer acted. It does not follow, however, that the discretionary function exception can be overcome by any allegation of a constitutional violation, however vague.[5] The cases on which petitioner relies, although broadly worded, do not hold otherwise. Many do not involve unconstitutional conduct at all.[6] To the extent the remainder offer any analysis, they do not engage whether alleged violations of constitutional rights that were not clearly established are sufficient to

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[5] Such an approach would undermine not only the purpose of the discretionary function exception, but also the limits of qualified immunity that apply in *Bivens* actions against federal officials. Plaintiffs may recover under *Bivens* only if a constitutional violation was clearly established when the conduct took place. As Judge Smith's panel dissent explained, Pet. App. 44a, to allow a plaintiff to recover in an FTCA suit against the United States by alleging a violation of a constitutional right that was not clearly established at the time of the conduct at issue would accordingly "turn[] *Bivens* on its head," by providing that "the United States may be liable for conduct even where its officers cannot be."

[6] *Medina* v. *United States*, 259 F.3d 220, 225 (4th Cir. 2001); *United States Fid. & Guar. Co.* v. *United States*, 837 F.2d 116, 122 (3d Cir.), cert. denied, 487 U.S. 1235 (1988); *K.W. Thompson Tool Co.* v. *United States*, 836 F.2d 721, 726-729 (1st Cir. 1988); *Red Lake Band of Chippewa Indians* v. *United States*, 800 F.2d 1187, 1196-1198 (D.C. Cir. 1986); *Pooler* v. *United States*, 787 F.2d 868, 871 (3d Cir. 1986), cert. denied, 479 U.S. 849 (1986); *In re Texas City Disaster Litig.*, 197 F.2d 771, 776-777 (5th Cir. 1952).

overcome the exception. See *Nurse* v. *United States*, 226 F.3d 996, 1002 n.2 (9th Cir. 2000) (declining to decide "the level of specificity with which a constitutional proscription must be articulated in order to remove the discretion of a federal actor").

b. The federal agents' conduct in this case did not violate any constitutional, statutory, or regulatory mandate, let alone one that "specifically prescribes a course of action for an employee to follow." *Gaubert*, 499 U.S. at 322. As the district court explained, petitioner's choice "not to be present at the time of the arrest," and "not to seek a custody order of her daughter prior to an hour and a half before Mr. Gallardo was scheduled to be repatriated to Mexico," presented the Border Patrol with the decision to "either forcibly remove R.M.G. from Mr. Gallardo even though there was no custody order directing them to do so, or let Mr. Gallardo continue with his possession of R.M.G., even though Mr. Gallardo was being repatriated to Mexico." Pet. App. 70a, 73a. In making that decision, "the Border Patrol Agents' conduct * * * was not mandated by any statute, regulation or policy," *id.* at 3a, nor did the Constitution compel a particular result.

The INA vests the Secretary of Homeland Security and his designated agents with responsibility for "the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens." 8 U.S.C. 1103(a)(1); 8 C.F.R. 2.1. The Act grants the Secretary the power and duty "to control and guard the boundaries and borders of the United States against the illegal entry of aliens," to "appoint for that purpose such number of employees of the Service as to him shall appear necessary and proper," and to "perform such other acts as he deems necessary for carrying

out his authority under the provisions of this chapter." 8 U.S.C. 1103(a)(3) and (5).

Petitioner does not dispute that when federal agents took Omar Gallardo to the Border Patrol station, held him for processing, and returned him to Mexico, the officers did so pursuant to this authority under the INA. In so doing, the officers were also called upon to accommodate the infant child in Gallardo's care, a necessary incident to the authority conferred upon the officers by the Act and its accompanying regulations. See 8 U.S.C. 1103(5) (authorizing all "acts * * * deem[ed] necessary" for the carrying out of expressly granted duties). Petitioner points to no mandatory statutory or regulatory duty that dictated the officers' actions in such a circumstance; indeed, she acknowledged below that there was none, see Pet. App. 71a n.11 (district court noting petitioner's agreement that "there are no policies, rules or statutes that appl[ied]" in this situation).

Petitioner contends that Border Patrol agents generally lack the authority to "detain [U.S.] citizens," Pet. 23, but the officers' actions here did not contravene that principle. As Judge Smith's panel dissent emphasized, R.M.G. herself "was not arrested, detained, held in custody, or deported—she was with *her father* and with *his consent*." Pet. App. 47a. Gallardo's insistence that his daughter remain in his care does not transform the agents' acts into a "detention" or "deportation."[7]

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[7] Petitioner's reliance on a report by the Inspector General of the Department of Homeland Security is likewise misplaced, see Pet. 23-24, since no detention occurred here. Moreover, the policy cited by petitioner concerned operations by the Immigration and Customs Enforcement's Office of Detention and Removal Operations (now known as Enforcement and Removal Operations)—not those of the Border Patrol. The Border Patrol, whose mission entails short-term apprehension and

Petitioner's contentions regarding the Hague Convention on the Civil Aspects of International Child Abduction and the International Parental Kidnapping Crime Act of 1993, Pet. 26, are similarly without merit.[8] The Hague Convention, implemented by the International Child Abduction Remedies Act, does not regulate the Border Patrol's transportation of children in the custody of a parent, but rather provides a forum for civil actions in which parents may seek return of or access to children wrongfully removed from their home country. Oct. 25, 1980, 99 U.S.T. 11, 1343 U.N.T.S. 89; 42 U.S.C. 11601-11611; *Sealed Appellant* v. *Sealed Appellee*, 394 F.3d 338, 342-343 (5th Cir. 2004); see generally *Abbott* v. *Abbott*, 130 S. Ct. 1983, 1989 (2010) (Hague Convention "does not alter the pre-abduction allocation of custody rights but leaves custodial decisions to the courts of the country of habitual residence"). The International Parental Kidnapping Crime Act of 1993 prohibits the removal of a child from the United States "with intent to obstruct the lawful exercise of parental rights,"

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prompt repatriation of foreign nationals, has no policy governing the temporary custody of United States citizens incident to proceedings against a foreign national. By comparison, the Office of Detention and Removal, which is responsible for holding individuals during potentially lengthy removal proceedings (for an average term of 30 days in 2008, see U.S. Immigration and Customs Enforcement, *Fact Sheet: Detention Mgmt.* (Nov. 20, 2008), http://www.ice.gov/news/library/factsheets/detention-mgmt.htm), has implemented policies more narrowly prescribing the individuals who may be retained in federal facilities for such a lengthy period.

[8] These authorities were not raised before the district court or the panel, and the en banc court did not address them. See *Brace*, 145 F.3d at 261 (emphasizing that the en banc Court will not consider an argument "not presented on appeal to the panel"); see also Gov't Supp. Br. 25 (advising en banc court of appeals of the waiver).

18 U.S.C. 1204(a); petitioner offers no authority for the proposition that acquiescence to a parent's lawful assertion of custody violates the Act, nor any evidence in this case of an intent to obstruct parental rights.

Petitioner's alleged constitutional violations are of no greater substance. Petitioner asserts (Pet. 26-27) that the Border Patrol violated R.M.G.'s Fourth Amendment right to remain in the United States and be free from unreasonable seizures, as well as petitioner's Fifth Amendment due process right "to familial relationships." She cites no cases, however, to demonstrate that it was clearly established at the time of the officers' actions that their conduct under these circumstances was unconstitutional. Indeed, petitioner acknowledged before the district court that she "ha[d] not been able to identify any case that addresses a custody dispute over [a] U.S. citizen child who is either in federal immigration custody or deportation proceedings." Pet. Amended MTD Resp. 12.

Gallardo's expressed desire to keep his infant daughter with him, and his consent on her behalf, dispenses with the allegation that the Border Patrol's actions constituted an involuntary seizure or removal of his daughter from the United States in violation of the Fourth Amendment. Petitioner does not dispute that, as Judge Smith's panel dissent explained, "parents can consent to conduct that would otherwise constitute a violation of a child's core Fourth Amendment rights." Pet. App. 46a n.6. Nor does petitioner suggest that the Border Patrol's actions were inconsistent with Texas custody law, or that petitioner possessed a superior right to determine where her daughter should remain during Gallardo's detention and subsequent removal to Mexico. Particularly in those circumstances, the Border Patrol's

determination not to upset the status quo of custody over R.M.G.—allowing the child to remain with her father rather than forcibly removing her to petitioner's possession, notwithstanding the absence of a court order so directing—cannot be characterized as an unlawful seizure of the child. At the very least, it is not clear how a reasonable agent could have known that this conduct would contravene a specific constitutional mandate. See *Gaubert*, 499 U.S. at 322; *Berkovitz*, 486 U.S. at 536.

Petitioner similarly fails to identify any substantive or procedural due process that petitioner and R.M.G. were entitled to yet not afforded. Petitioner suggests that R.M.G. could not be allowed to accompany Gallardo without some degree of procedure; but any process for determining whether petitioner had a superior claim to custody could be provided only by state authorities, as both the Border Patrol and state and local officials had explained to petitioner previously.[9] Texas authorities had likewise made clear how petitioner should proceed, but she declined to follow that course. Instead of pursuing state remedies, petitioner reported Gallardo's unlawful status to the Border Patrol. Having proceeded in this manner, petitioner cannot assert that the Border

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[9] Petitioner implies (Pet. 5) that the Border Patrol misled her and failed to inform her of the need to obtain a court order. But when petitioner first visited the Border Patrol, the agency contacted the local sheriff's department, was informed that "the best thing for [petitioner] to do was obtain a court order from a Judge ordering her husband to release the child to her," and advised petitioner to take such action "as soon as possible." ROA 242-43, 862, 952; Pet. App. 56a-57a. Even if there were a dispute over the agents' representations to petitioner concerning her need to act to maintain custody of R.M.G., any cause of action based on such statements would be barred by the FTCA's misrepresentation exception, 28 U.S.C. 2680(h).

Patrol failed to provide the process she could have obtained from state authorities.

Gallardo's expressed desire, as a parent, was to keep his daughter in his company. It is not contested that Gallardo asked for his daughter to remain with him at the Border Patrol station and to join him when he was taken to Mexico. Gallardo is concededly the child's father and had lawful custody of her. Especially in light of the respect for the parent-child relationship under the laws and traditions of this country, there was no apparent reason why Gallardo could not keep his daughter with him when he went to Mexico, whatever her citizenship status. The Border Patrol agents' refusal to upset the status quo and interfere with state custody matters does not offend any constitutional proscription, clear or otherwise.

3. Petitioner contends that the decision below (silently) misinterprets the relationship between the law enforcement proviso in 28 U.S.C. 2680(h) and the discretionary function exception. She notes (Pet. 28) that Section 2680(h) permits suit under the FTCA for certain intentional torts committed by law enforcement personnel, and contends that conduct falling within this proviso is categorically ineligible for the discretionary function exception. That issue is not properly presented in this case (see, pp. 12-13, *supra*), but, in any event, petitioner is mistaken.

Congress enacted Section 2680(h) "as a counterpart to the *Bivens* case and its progen[y], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for *the same type of conduct* that is alleged to have occurred in *Bivens*." *Carlson* v. *Green*, 446 U.S. 14, 20 (1980) (quoting S. Rep. No. 588, 93d Cong., 1st Sess. 3 (1973)) (em-

phasis added). As noted above, defendants in *Bivens* actions are entitled to immunity when their actions do not violate clearly established constitutional proscriptions, and that same kind of immunity is incorporated into the discretionary function exception. See pp. 14-18, *supra*. Accordingly, the Congress that provided a counterpart to a *Bivens* action likewise would have intended the discretionary function exception to apply to that counterpart.

Petitioner does not explain why Congress, in creating a "counterpart" to *Bivens*, would have intended to subject the United States to broader liability than that of its individual employees. See *Carlson*, 446 U.S. at 19-20 ("[T]he congressional comments accompanying [Section 2680(h)] made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action."). The law enforcement proviso accordingly affords no greater waiver of sovereign immunity in the context of discretionary functions than Section 2680(a) already affords.

The decisions of the courts of appeals (see Pet. 29-34) do not meaningfully vary in this regard. As petitioner acknowledges, the decisions of the Fourth, Ninth, and D.C. Circuits are fully consistent with the result in this case. The Second and Seventh Circuits likewise contemplate that so long as an officer's function is truly discretionary, the law enforcement proviso will not preclude application of the discretionary function exception in Section 2680(a). See *Reynolds* v. *United States*, 549 F.3d 1108, 1113 (7th Cir. 2008) ("[A] federal investigator's decision to lie under oath is separable from the discretionary decision to prosecute."); *Caban* v. *United States*, 671 F.2d 1230, 1233 (2d Cir. 1982) (holding officers' acts nondiscretionary because "the activities are

not the kind that involve weighing important policy choices").[10]

While the Eleventh Circuit in *Nguyen* v. *United States*, 556 F.3d 1244, 1256-1257 (2009), has suggested that the law enforcement proviso is not limited by the discretionary function exception, it too has acknowledged that the "provision should be viewed as a counterpart to the *Bivens* case and its progen[y], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens*." *Id.* at 1256 (internal citation omitted); see also *Denson* v. *United States*, 574 F.3d 1318, 1337 (11th Cir. 2009) ("As co-extensive causes of action, *Bivens* and FTCA claims necessarily arise from the same wrongful acts or omissions of a government official. By the same token, the same set of facts determines the theories available to the United States in defending the FTCA case."), cert. denied, 130 S. Ct. 3384 (2010). Where, as here, a plaintiff fails to establish any violation of a clearly established constitutional right, that plaintiff accordingly may not recover for discretionary acts even under the Eleventh Circuit's reading of the law enforcement proviso. *Ibid.* In any event, this case would be a poor vehicle to address any differences between the Eleventh Circuit and that of other courts of appeals, since the Fifth Circuit in this case did not address the question.

4. Finally, this case is a poor vehicle for review because of the weakness of petitioner's allegations that the

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[10] The Third Circuit has reserved judgment on the question. See *Pooler*, 787 F.2d at 872.

officers' conduct violated constitutional and state-law duties.

a. As discussed above (pp. 14-18, *supra*), petitioner's contention that the discretionary function exception is unavailable when a plaintiff alleges a constitutional violation fails because she does not point to any authority clearly establishing with the required level of specificity that what the officers did here violated the Fourth or Fifth Amendment. Indeed, petitioner's complaint failed to state any claim of a constitutional violation, whether or not clearly established. See pp. 21-23, *supra*; see also Pet. App. 17a (Dennis, J., concurring in the judgment in part and dissenting in part) ("The facts as alleged by [petitioner] do not disclose any constitutional or statutory violations."); *id.* at 47a (Smith, J., dissenting) (Gallardo's "explicit parental consent means that R.M.G.'s constitutional rights were not violated.").

b. Even if petitioner could overcome the discretionary function bar, it is doubtful that she has stated any valid state-law cause of action. Petitioner's amended complaint asserted claims of negligence, intentional infliction of emotional distress, false imprisonment, abuse of process, and assault. Pet. App. 89a-95a. It is difficult to fathom how the agents' decision (after consultation with the state child welfare agency) to permit R.M.G.'s natural father to remain accompanied by his infant child upon his return to Mexico could possibly give rise to any of the state law torts alleged by petitioner. See, *e.g.*, *id.* at 16a (Dennis, J., concurring in part and dissenting in part) (explaining that petitioner's false imprisonment claim fails under Texas law because "her father could and did consent on her behalf to her remaining with him"); *id.* at 15a ("It is not clear to me whether the [petitioner's] claims for abuse of process and assault can sur-

vive a Rule 12(b)(6) motion to dismiss."); *Allen* v. *State*, 253 S.W.3d 260, 261 (Tex. Crim. App. 2008) (consent constitutes a defense to assault); *Morgan* v. *City of Alvin*, 175 S.W.3d 408, 418 (Tex. Ct. App. 2004) ("The elements of assault are the same in both civil and criminal cases.").[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11] Petitioner's claim for negligence, *i.e.*, that the agents negligently "caused the wrongful deportation of a U.S. citizen minor child," Pet. App. 90a, fails because R.M.G. was not deported. She went to Mexico in the custody of her father. See *id.* at 47a (Smith, J., dissenting). Petitioner's claim for intentional infliction of emotional distress fails because the agents' decision to permit R.M.G. to stay in the custody of her father does not satisfy that tort's requirement that the conduct be "extreme and outrageous," *i.e.*, "that which '[goes] beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Wornick Co.* v. *Casas*, 856 S.W.2d 732, 734 (Tex. 1993) (quoting Restatement (Second) of Torts § 46, cmt. d. (1965)) (brackets in original).